

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO  
DISMISS ALL CHARGES AS  
THE COMMISSION IS  
IMPROPERLY CONSTITUTED:  
APPOINTING AUTHORITY  
LACKS THE POWER TO  
APPOINT A MILITARY  
COMMISSION**

**4 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges against Mr. Hicks on the ground that the military commission has been improperly constituted by a person without the power to exercise military jurisdiction, and states in support of this motion:

1. **Synopsis:** Military jurisdiction can be exercised only by persons authorized under the laws of war and the Uniformed Code of Military Justice. The power to exercise military jurisdiction is limited to those commanders authorized to convene general courts-martial. The Appointing Authority is not so empowered, and therefore lacks the capacity to appoint a military commission.

2. **Facts:** The Appointing Authority is a civilian Department of Defense employee who is not empowered to convene general courts-martial or command military forces in battle.

3. **Discussion:** The Appointing Authority, Mr. John Altenburg,<sup>1</sup> lacks the power to exercise military jurisdiction in any form, including the appointment of a military commission. Mr. Altenburg is not a commissioned officer; nor does he possess general court-martial convening power, a prerequisite to the proper exercise of military jurisdiction.

The power to appoint military commissions is derived from the power to exercise military jurisdiction, specifically, the power to convene a general courts-martial. Military jurisdiction is exercised in military law, martial law, military government or "with the respect to offenses against the law of war."<sup>2</sup> Military commissions have been the forum used to exercise military jurisdiction with "respect to offenses against the laws of war."<sup>3</sup>

<sup>1</sup> Mr. Altenburg is a retired Army officer who is currently employed by the Department of Defense, in a civilian capacity, as the Appointing Authority for the Office of Military Commissions.

<sup>2</sup> Manual for Courts-Martial, 2004, Part I Preamble, "2. Exercise of military jurisdiction":

(a) *Kinds.* Military jurisdiction is exercised by:

1. A government in the exercise of that branch of the municipal law which regulates its military establishment. (Military law).
2. A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require. (Martial law).
3. A belligerent occupying enemy territory. (Military government).
4. A government with respect to offenses against the law of war.

<sup>3</sup> Manual for Courts-Martial, 2004 Part I Preamble, "2. Exercise of military jurisdiction," (a)(4).

Winthrop, in his treatise on "Military Law and Precedent," describes the limits on the power to appoint military commissions: "[i]n the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades. The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial."<sup>4</sup>

While more than fifty years have passed since the last use of military commissions, those most recent military commissions were appointed under the authority of military officials also empowered to convene general courts-martial.<sup>5</sup> For instance, in 1942, President Roosevelt personally appointed the military commission to try eight Nazi Saboteurs.<sup>6</sup> In 1945, two other Germans who had come ashore the United States by submarine were tried before a military commission convened by the Commanding General, Second Service Command.<sup>7</sup>

Likewise, military commissions used abroad during World War II were also convened by military commanders. The military commission that was the subject of review in *Johnson v. Eisentrager*,<sup>8</sup> was appointed by the United States Commanding General at Nanking, China, who was also empowered to convene general courts-martial under the then-current Articles of War. This authority was properly delegated to them by the Joint Chiefs of Staff of the United States through the Commanding General, United States Forces, China Theatre.<sup>9</sup>

In *In Re Yamashita*,<sup>10</sup> the Supreme Court addressed the issue of military commission jurisdiction, and specifically noted that a military commission has jurisdiction over law of war violations only when the commission is "created by appropriate military command."<sup>11</sup> The Court explained in *Yamashita* that General Styer, Commander of the United States Armed Forces, Western Pacific, was a competent authority to appoint the commission to try General Yamashita because he was the military commander over the area where the alleged offenses occurred. Relying on the principles enunciated by Winthrop, the Supreme Court explained that "[t]he congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long-established American precedents. Such a commission may be created by

---

<sup>4</sup> Winthrop, "Military Law and Precedent," Vol.2, 2<sup>nd</sup> Ed. (1986) page 835.

<sup>5</sup> All Military tribunals set up under the power of a supreme allied commander, which exercised military jurisdiction under an occupation theory distinct from purely United States controlled military commissions, have also been ordered by a military officer authorized to convene general courts-martial. See *Hirota v. MacArthur*, 338 U.S. 197 (1948).

<sup>6</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>7</sup> See *Colepaugh v. Looney*, 235 F.2d 429 (10<sup>th</sup> Cir, 1956).

<sup>8</sup> 339 U.S. 763 (1950).

<sup>9</sup> *Id.* at 766.

<sup>10</sup> 327 U.S. 1 (1946).

<sup>11</sup> *Id.* at 7.

any field commander or by any commander competent to appoint a general court-martial, as was General Styer, who had been vested with the power by order of the President."<sup>12</sup>

The authority to appoint a military commission flows from the military authority to command and convene general courts-martial, as well as from being the military commander of a geographical area in which a state of war or occupancy is ongoing. As Attorney General James Speed, who served in that post at the conclusion of the U.S. Civil War, explained, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the laws and usages of war."<sup>13</sup>

Here, the Appointing Authority does not qualify as a legitimate delegee. Article 22, Uniform Code of Military Justice, provides who may convene general courts-martial, specifically empowering the President, Secretary of Defense, Service Secretaries and various Commanding Officers. The exercise of military jurisdiction is a military function instilled in military commissioned officers of command. The President, in his role as commander-in-chief, has the power to exercise military jurisdiction as codified by Congress in Article 22, Unified Code of Military Justice, and the law of war.

The President's Military Order of 13 November 2001 directs the Secretary of Defense to issue such orders and regulations to carry out military commissions. The President's Military Order specifically states that the Secretary of Defense will issue orders appointing one or more military commissions.<sup>14</sup> As the Secretary of Defense is authorized to convene general courts-martial, such action is permissible. Yet, this commission has not been appointed by the Secretary of Defense. Instead, this commission has been appointed by a federal civilian employee who is neither a commanding officer nor a commissioned officer. Thus, Mr. Altenburg lacks the requisite authority under the law of war to fight battles or organize military tribunals.

Consequently, the Appointing Authority lacks the power to exercise military jurisdiction. Therefore, the military commission is improperly constituted, and the charges must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

**5. Evidence:**

A: The testimony of [REDACTED]

---

<sup>12</sup> *Id.* at 10.

<sup>13</sup> Attorney General James Speed, "The Opinion of the Attorney General Affirming the Legality of Using a Military Commission to Try the Conspirators." Attorney General's Office, Washington, July 1865.

<sup>14</sup> Section 4(b) "Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order."  
(b) As a military function and in light of the findings in Section 1. including subsection (f), thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.


**B: Attachments**

1. Winthrop, "Military Law and Precedent," Vol.2. 2<sup>nd</sup> Ed. (1986) page 835.
2. Attorney General James Speed, "The Opinion of the Attorney General Affirming the Legality of Using a Military Commission to Try the Conspirators" (1865).

6. **Relief Requested:** The defense requests that all charges be dismissed.

7. The defense requests oral argument on this motion.

By:

  
for M.D. MORI  
Major, U.S. Marine Corps  
Detailed Defense Counsel

JOSHUA L. DRATEL

Joshua L. Dratel, P.C.

14 Wall Street

28<sup>th</sup> Floor

New York, New York 10005

(212) 732-0707

*Civilian Defense Counsel for David M. Hicks*

JEFFERY D. LIPPERT

Major, U. S. Army

Detailed Defense Counsel

William Winthrop

Vol. 2

# Military Law and Precedents

A Law Classic

BeardBooks

**CONSTITUTION OF THE MILITARY COMMISSION.** In the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades.<sup>2</sup> The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial. Commanders of "districts" have sometimes, and legally under the general law of war and military government, convened these tribunals, though their commands have been less than a brigade; but such instances have been rare. The provisions of the Articles of war indicating by whom the court is to be constituted where the commander who would regularly order it is in fact the prosecutor or accuser, apply in terms only to general courts-martial, and are not *required* to be observed in the convening of the more summary tribunals under consideration. Where, however, an unreasonable delay will not thereby be caused, or the interests of the service or of the public otherwise prejudiced, such provisions may well, as a measure of justice or expediency, be observed.<sup>3</sup>

**1308 COMPOSITION.** Following the analogy of courts-martial, military commissions in this country have invariably been composed of commissioned officers of the army. Strictly legally they might indeed be composed otherwise should the commander *will* it—as, for example, in part of civilians or of enlisted men. The court-martial convened under martial law by Gov. Eyre, in Jamaica in 1865, for the trial of Geo. W. Gordon, was a mixed court of one military and two naval officers, and it was in regard to this court that D'Israeli observed in Parliament that—"in the state of martial law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."<sup>4</sup>

The *rank* of the members of a military commission is legally immaterial. In a case indeed, (which must be rare,) of a trial of an officer of the army by such a tribunal, the provision of Art. 79 as to the relative rank of the members will, if practicable, properly be regarded.

In the absence of any law fixing the *number* of members of a military commission, the same may legally be composed of any number in the discretion of the convening authority. A commission of a single member would be as strictly legal as would be one of thirteen members. In his General Orders already cited,<sup>5</sup> Gen. Scott directed that military commissions should be governed as to their composition, &c., by the provisions of the Articles of war prescribing the number of members, &c., for courts-martial: as to councils of war, it was specified that they should consist of "not less than three nor

<sup>2</sup> As to the general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial—see G. O. 20 of 1847, (Gen. Scott;) Do. 1, 7, 33, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the N. West, 1864; 1 Bishop, C. L. § 45, 52; Digest, 501. As to the procedure of military courts under martial law, the English writer Pratt observes, (p. 216.)—"The forms of military law should, as far as practicable, be adhered to."

<sup>3</sup> See G. C. M. O. 11, Dept. of Texas, 1866.

<sup>4</sup> Jones, Notes on Martial Law, 11; Finlason, History of the Jamaica Case, 111. In Queen v. Nelson & Brand, Cockburn, C. J., commented upon the composition of this court as unauthorized—as of course it was by the law governing courts-martial proper. It appears from the report the Commissioners on the Jamaica Case, (Finlason, Hist., p. 110,) that this court had been preceded, during the same exigency, by one "consisting partly of members of the legislature." In the Demerara Case, in 1823, a militia officer, (really the head of the colonial judiciary, commissioned *pro hac vice* in the militia,) was associated with officers of the army on the court-martial which tried missionary Smith, a civilian. 2 Hansard, XI, 972.

<sup>5</sup> G. O. 20, 190, 287, of 1847.

**Order Establishing a Military Commission to Try the Lincoln Assassination  
Conspirators**

**& The Opinion of the Attorney General Affirming the Legality  
of Using a Military Commission to Try the Conspirators**

**Order of the President**

**PROCEEDINGS OF A MILITARY COMMISSION,  
Convened at Washington, D.C., by virtue of the following Orders:**

{Executive Chamber Washington City, May 1, 1865.}

WHEREAS, the Attorney-General of the United States hath given his opinion:

That the persons implicated in the murder of the late President, Abraham Lincoln, and the attempted assassination of the Honorable William H. Seward, Secretary of State, and in an alleged conspiracy to assassinate other officers of the Federal Government at Washington City, and their aiders and abettors, are subject to the jurisdiction of, and lawfully triable before, a Military Commission;

It is ordered: 1st That the Assistant Adjutant-General detail nine competent military officers to serve as a Commission for the trial of said parties, and that the Judge Advocate General proceed to prefer charges against said parties for their alleged offenses, and bring them to trial before said Military Commission; that said trial or trials be conducted by the said Judge Advocate General, and as recorder thereof, in person, aided by such Assistant and Special Judge Advocates as he may designate; and that said trials be conducted with all diligence consistent with the ends of justice: the said Commission to sit without regard to hours.

2d. That Brevet Major-General Hartranft be assigned to duty as Special Provost Marshal General, for the purpose of said trial, and attendance upon said Commission, and the execution of its mandates.

3d. That the said Commission establish such order or rules of proceedings as may avoid unnecessary delay, and conduce to the ends of public justice.

[Signed]

ANDREW JOHNSON

**OPINION ON THE CONSTITUTIONAL POWER OF THE MILITARY  
TO TRY AND EXECUTE THE ASSASSINS OF THE PRESIDENT.**

**BY ATTORNEY GENERAL JAMES SPEED.  
ATTORNEY GENERAL'S OFFICE  
Washington, July —, 1865.**

SIR: You ask me whether the persons charged with the offense of having assassinated the

Attachment 2 to RE 12

President can be tried before a military tribunal, or must they be tried before a civil court. The President was assassinated at a theater in the city of Washington. At the time of the assassination a civil war was flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by Federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President's House and person were, or should have been, under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.

Such being the facts, the question is one of great importance— important, because it involves the constitutional guarantees thrown about the rights of the citizen, and because the security of the army and the government in time of war is involved; important, as it involves a seeming conflict between the laws of peace and of war.

Having given the question propounded the patient and earnest consideration its magnitude and importance require, I will proceed to give the reasons why I am of the opinion that the conspirators not only may but ought to be tried by a military tribunal.

A civil court of the United States is created by a law of Congress, under and according to the Constitution. To the Constitution and the law we must look to ascertain how the court is constituted, the limits of its jurisdiction, and what its mode of procedure. A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offenses as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war. In time of peace, neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces." I do not think that Congress can, in time of war or peace, under this clause of the Constitution, create military tribunals for the adjudication of offenses committed by persons not engaged in, or belonging to, such forces. This is a proposition too plain for argument. But it does not follow that because such military tribunals can not be created by Congress under this clause, that they can not be created at all. Is there no other power conferred by the Constitution upon Congress or the military, under which such tribunals may be created in time of war?

That the law of nations constitutes a part of the laws of the land, must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that "Congress shall have power to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations." To define is to give the limits or precise meaning of a word or thing in being; to make, it is to call into being. Congress has the power to define, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy. From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land. But very soon after the organization of the Federal Government, Mr. Randolph, then Attorney General, said: "The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the

Attachment 2 to RE —

Page 2 of 12

existence of a nation, subject to modification on some points of indifference." The framers of the Constitution knew that a nation could not maintain an honorable place among the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land. Hence Congress may define those laws, but can not abrogate them, or as Mr. Randolph says, may "modify on some points of indifference."

That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority. But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. No one that has ever glanced at the many treatises that have been published in different ages of the world by great, good and learned men, can fail to know that the laws of war constitute a part of the law of nations, and that those laws have been prescribed with tolerable accuracy.

Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war among civilized nations. Under the power to define those laws, Congress can not abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people.

As war is required by the frame-work of our government to be prosecuted according to the known usages of war among the civilized nations of the earth, it is important to understand what are the obligations, duties, and responsibilities imposed by war upon the military. Congress, not having defined, as under the Constitution it might have done, the laws of war, we must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent to those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.

The power conferred by war is, of course, adequate to the end to be accomplished, and not greater than what is necessary to be accomplished. The law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great power of war, or rather the prohibitions against the use of that power, increase or diminish as the necessity of the case demands. When a city is besieged and hard pressed, the commander may exert an authority over the non-combatants which he may not when no enemy is near.

All wars against a domestic enemy or to repel invasions, are prosecuted to preserve the Government. If the invading force can be overcome by the ordinary civil police of a country, it should be done without bringing upon the country the terrible scourge of war; if a commotion or insurrection can be put down by the ordinary process of law, the military should be called out. A defensive foreign war is declared and carried on because the civil police is inadequate to repel it; a civil war is waged because the laws cannot be peacefully enforced by the ordinary tribunals of the country through civil process and by civil officers. Because of the utter inability to keep the peace and maintain order by the customary officers and agencies in time of peace, armies are organized and put into the field. They are called out and invested with the powers of war to prevent total anarchy and to preserve the Government. Peace is the normal condition of a country, and war abnormal, neither being without law, but each having laws appropriate to the condition of society. The maxim *inter arma silent leges* is never wholly true. The object of war is to bring society out of its

Attachment 2 to RE \_\_\_\_\_

abnormal condition; and the laws of war aim to have that done with the least possible injury to persons or property.

Anciently, when two nations were at war, the conqueror had, or asserted, the right to take from enemy his life, liberty and property: if either was spared, it was as a favor or act of mercy. By the laws of nations, and of war as a part, thereof, the conqueror was deprived of this right.

When two governments, foreign to each other, are at war, or when a civil war becomes territorial, all of the people of the respective belligerents become by the law of nations the enemies of each other. As enemies they can not hold intercourse, but neither can kill or injure the other except under a commission from their respective governments. So humanizing have been, and are the laws of war, that it is a high offense against them to kill an enemy without such commission. The laws of war demand that a man shall not take human life except under a license from his government; and under the Constitution of the United States no license can be given by any department of the Government to take human life in war, except according to the law and usages of war. Soldiers regularly in the service have the license of the government to deprive men, the active enemies of their government, of their liberty and lives; their commission so to act is as perfect and legal as that of a judge to adjudicate, but the soldier must act in obedience to the laws of war, as the judge must in obedience to the civil law. A civil judge must try criminals in the mode prescribed in the Constitution and the law; so, soldiers must kill or capture according to the laws of war. Non-combatants are not to be disturbed or interfered with by the armies of either party except in extreme cases. Armies are called out and organized to meet and overcome the active, acting public enemies.

But enemies with which an army has to deal are of two classes:

1. Open, active participants in hostilities, as soldiers who wear the uniform, move under the flag, and hold the appropriate commission from their government. Openly assuming to discharge the duties and meet the responsibilities and dangers of soldiers, they are entitled to all belligerent rights, and should receive all the courtesies due to soldiers. The true soldier is proud to acknowledge and respect those rights, and every cheerfully extends those courtesies.
2. Secret, but active participants, as spies, brigands, bushwackers, jayhawkers, war rebels and assassins. In all wars, and especially in civil wars, such secret, active enemies rise up to annoy attack and army, and must be met and put down by the army. When lawless wretches become so impudent and powerful as to not be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked. Wars never have been and never can be conducted upon the principle that an army is but a posse comitatus of a civil magistrate.

An army, like all other organized bodies, has a right, and it is its first duty, to protect its own existence and the existence of all its parts, by the means and in the mode usual among civilized nations when at war. Then the question arises, do the laws of war authorize a different mode of proceeding, and the use of different means against secret active enemies from those used against open, active enemies? As has been said, the open enemy or soldier in time of war may be met in battle and killed, wounded or taken prisoner, or so placed by the lawful strategy of war as that he is powerless. Unless the law of self-preservation absolutely demands it, the life of a wounded enemy or a prisoner must be spared. Unless pressed thereto by the extremest necessity, the laws of war condemn and punish with great

Attachment 2 to RE \_\_\_\_\_

Page 4 of 12

severity harsh or cruel treatment to a wounded enemy or prisoner.

Certain stipulations and agreements, tacit or express, betwixt the open belligerent parties, are permitted by the laws of war, and are held to be of very high and sacred character. Such is the tacit understanding, or it may be usage, of war, in regard to flags of truce. Flags of truce are resorted to as a means of saving human life, or alleviating human suffering. When not used with perfidy, the laws of war require that they should be respected. The Romans regarded ambassadors betwixt belligerents as persons to be treated with consideration, and respect. Plutarch, in his Life of Caesar, tells us that the barbarians in Gaul having sent some ambassadors to Caesar, he detained them, charging fraudulent practices, and led his army to battle, obtaining a great victory.

When the Senate decreed festivals and sacrifices for the victory, Cato declared it to be his opinion that Caesar ought to be given into the hands of the barbarians, that so the guilt which this breach of faith might otherwise bring upon the State might be expiated by transferring the curse on him who was the occasion of it.

Under the Constitution and laws of the United States, should a commander be guilty of such a flagrant breach of law as Cato charged upon Caesar, he would not be delivered to the enemy, but would be punished after a military trial. The many honorable gentlemen who hold commissions in the army of the United States, and have been deputed to conduct war according to the laws of war, would keenly feel it as an insult to their profession of arms for any one to say that they could not or would not punish a fellow-soldier who was guilty of wanton cruelty to a prisoner, or perfidy toward the bearers of a flag of truce.

The laws of war permit capitulations of surrender and paroles. They are agreements betwixt belligerents, and should be scrupulously observed and performed. They are contracts wholly unknown to civil tribunals. Parties to such contracts must answer any breaches thereof to the customary military tribunals in time of war. If an officer of rank, possessing the pride that becomes a soldier and a gentleman, who should capitulate to surrender the forces and property under his command and control, be charged with a fraudulent breach of the terms of surrender, the laws of war do not permit that he should be punished without a trial, or, if innocent, that he shall have no means of wiping out the foul imputation. If a paroled prisoner is charged with a breach of his parole, he may be punished if guilty, but not without a trial. He should be tried by a military tribunal, constituted and proceeding as the laws and usages of war prescribe.

The laws and usages of war contemplate that soldiers have a high sense of personal honor. The true soldier is proud to feel and know that his enemy possesses personal honor, and will conform and be obedient to the laws of war. In a spirit of justice, and with a wise appreciation of such feelings, the laws of war protect the character and honor of an open enemy. When by the fortunes of war one enemy is thrown into the hands and power of another, and is charged with dishonorable conduct and a breach of the laws of war, he must be tried according to the usages of war. Justice and fairness say that an open enemy to whom dishonorable conduct is imputed, has a right to demand a trial. If such a demand can be rightfully made, surely it can not be rightfully refused. It is to be hoped that the military authorities of this country will never refuse such a demand, because there is no act of Congress that authorizes it. In time of war the law and usage of war authorize it, and they are a part of the law of the land.

Attachment 2 to RE

One belligerent may request the other to punish for breaches of the laws of war, and, regularly, such a request should be made before retaliatory measures are taken. Whether the laws of war have been infringed or not, is of necessity a question to be decided by the laws and usages of war, and is cognizable before a military tribunal. When prisoners of war conspire to escape, or are guilty of a breach of appropriate and necessary rules of prison discipline, they may be punished, but not without trial. The commander who should order every prisoner charged with improper conduct to be shot or hung, would be guilty of a high offense against the laws of war, and should be punished therefor, after a regular military trial. If the culprit should be condemned and executed, the commander would be as free from guilt as if the man had been killed in battle.

It is manifest, from what has been said, that military tribunals exist under and according to the laws and usages of war, in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the laws and usages of war.

Having seen that there must be military tribunals to decide questions arising in time of war betwixt belligerents who are open and active enemies, let us next see whether the laws of war do not authorize such tribunals to determine the fate of those who are active, but secret, participants in the hostilities. In Mr. Wheaton's Elements of International Law, he says: "The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has modified this maxim by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the State; such are the regularly commissioned naval and military forces of the national and all others called out in its defense, or spontaneously defending themselves, in case of necessity, without any express authority for that purpose. Cicero tells us in his offices, that by the Roman feudal law no person could lawfully engage in battle with the public enemy without being regularly enrolled, and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States were allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that, in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practiced by civilized nations." In speaking on the subject of banditti, Patrick Henry said in the Virginia Convention, "The honorable gentleman has given you an elaborate account of what he judges tyrannical legislation, and an ex post facto law (in the case of Josiah Phillips); he has misrepresented the facts. That man was not executed by a tyrannical stroke of power; nor was he a Socrates; he was a fugitive murderer and an outlaw; a man who commanded an infamous banditti, and at a time when the war was at the most perilous stage, he committed the most cruel and shocking barbarities; he was an enemy to the human name. Those who declare war against the human race may be struck out of existence as soon as apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws in criminal cases. The enormity of his crime did not entitle him to it. I am truly a friend to legal forms and methods, but, sir, the occasion warranted the measure. A pirate, an outlaw, or a common enemy to all mankind, may be put to death at any time. It is justified by the law of nature and nations." (3d volume Elliott's Debates on Federal Constitution, page 140.)

Attachment 2 to RE \_\_\_\_\_

Page 6 of 12

No reader, not to say student, of the law of nations, can doubt but that Mr. Wheaton and Mr. Henry have fairly stated the laws of war. Let it be constantly borne in mind that they are talking of the law in a state of war. These banditti that spring up in time of war are respecters of no law, human or divine, of peace or of war, are *hotes humani generis*, and may be hunted down like wolves. Thoroughly desperate, and perfectly lawless, no man can be required to peril his life in venturing to take them prisoners— as prisoners, no trust can be reposed in them. But they are occasionally made prisoners. Being prisoners, what is to be done with them? If they are public enemies, assuming and exercising the right to kill, and are not regularly authorized to do so, they must be apprehended and dealt with by the military. No man can doubt the right and duty of the military to make prisoners of them, and being public enemies, it is the duty of the military to punish them for any infraction of the laws of war. But the military can not ascertain whether they are guilty or not without the aid of a military tribunal.

In all wars, and especially in civil wars, secret but active enemies are almost as numerous as open ones. That fact has contributed to make civil wars such scourges to the countries in which they rage. In nearly all foreign wars the contending parties speak different languages and have different habits and manners; but in most civil wars that is not the case; hence there is a security in participating secretly in hostilities that induces many to thus engage. War prosecuted according to the most civilized usage is horrible, but its horrors are greatly aggravated by the immemorial habits of plunder, rape and murder practiced by secret, but active participants. Certain laws and usages have been adopted by the civilized world in wars between nations that are not kin to one another, for the purpose and to the effect of arresting or softening many of the necessary cruel consequences of war. How strongly bound we are, then, in the midst of a great war, where brother and personal friend are fighting against brother and friend, to adopt and be governed by those laws and usages.

A public enemy must or should be dealt with in all wars by the same laws. The fact that they are public enemies, being the same, they should deal with each other according to those laws of war that are contemplated by the Constitution. Whatever rules have been adopted and practiced by the civilized nations of the world in war, to soften its harshness and severity, should be adopted and practiced by us in this war. That the laws of war authorized commanders to create and establish military commissions, courts or tribunals, for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, can not be denied. That the judgments of such tribunals may have been sometimes harsh, and sometimes even tyrannical, does not prove that they ought not to exist, nor does it prove that they are not constituted in the interest of justice and mercy. Considering the power that the laws of war give over secret participants in hostilities, such as banditti, guerrillas, spies, etc., the position of a commander would be miserable indeed if he could not call to his aid the judgments of such tribunals; he would become a mere butcher of men, without the power to ascertain justice, and there can be no mercy where there is no justice. War in its mildest form is horrible; but take away from the contending armies the ability and right to organize what is now known as a Bureau of Military Justice, they would soon become monster savages, unrestrained by any and all ideas of law and justice. Surely no lover of mankind, no one that respects law and order, no one that the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities. It would be a miracle if the records and history of this war do not show occasional cases in which those tribunals have erred; but they will show many.

Attachment 2 to RE

Page 7 of 12

very many cases in which human life would have been taken but for the interposition and judgments of those tribunals. Every student of the laws of war must acknowledge that such tribunals exert a kindly and benign influence in time of war. Impartial history will record the fact the Bureau of Military Justice, regularly organized during this war, has saved human life and prevented human suffering. The greatest suffering, patiently endured by soldiers, and the hardest battles gallantly fought during this protracted struggle, are not more creditable to the American character than the establishment of this bureau. This people have such an educated and profound respect for law and justice— such a love of mercy— that they have, in the midst of this greatest of civil wars, systematized and brought into regular order, tribunals that before this war existed under the law of war, but without general rule. To condemn the tribunals that have been established under this bureau, is to condemn and denounce the war itself, or justifying the war, to insist that it shall be prosecuted according to the harshest rules, and without the aid of the laws, usages, and customary agencies for mitigating those rules. If such tribunals had not existed before, under the laws and usages of war, the American citizen might as proudly point to their establishments as to our inimitable and inestimable constitutions. It must be constantly borne in mind that such tribunals and such a bureau can not exist except in time of war, and can not then take cognizance of offenders and offenses against the laws of war.

But it is insisted by some, and doubtless with honesty, and with a zeal commensurate with their honesty, that such military tribunals can have no constitutional existence. The argument against their constitutionality may be shortly, and I think fairly, stated thus: Congress alone can establish military or civil judicial tribunals. As Congress has not established military tribunals, except such as have been created under the articles of war, and which articles are made in pursuance of that clause in the Constitution which gives to Congress the power to make rules for the government of the army and navy, and any other tribunal is and must be plainly unconstitutional, and all its acts void.

This objection thus stated, or stated in any other way, begs the question. It assumes that Congress alone can establish military judicial tribunals. Is that assumption true? We have seen that when war comes, the laws and usages of war come also, and that during the war they are a part of the laws of the land. Under the Constitution, Congress may define and punish offenses against those laws, but in default of Congress defining those laws and prescribing a punishment for their infraction, and the mode of proceeding to ascertain whether an offense has been committed, and what punishment is to be inflicted, the army must be governed by the laws and usages of war as understood and practiced by the civilized nations of the world. It has been abundantly shown that these tribunals are constituted by the army in the interest of justice and mercy, and for the purpose and to the effect of mitigating the horrors of war.

But it may be insisted that though the laws of war, being a part of the law of nations, constitute a part of the laws of the land, that those laws must be regarded as modified so far, and whenever they come in direct conflict with plain constitutional provisions. The following clauses of the Constitution are principally relied upon to show the conflict betwixt the laws of war and the Constitution:

"The trial of all crimes, except in cases of impeachment, shall be by the jury: and such trial shall be held in the State where the said crime shall have been committed: but when not committed within any State, the trial shall be at such or places as the Congress may by law have directed." (Art. III. of the original Constitution. sec. 2.)

Attachment 2 to RE \_\_\_\_\_

Page 8 of 12

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled, in any criminal case, to be witness against himself, nor be deprived of life, liberty or property, without due process of law: nor shall private property be taken for public use without just compensation."

(Amendments to the Constitution. Art. V.)

"In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation: to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor: and to have the assistance of counsel for his defense." (Art. VI of the amendments to the Constitution.)

These provisions of the Constitution are intended to fling around the life, liberty and property of a citizen all the guarantees of a jury trial. These constitutional guarantees can not be estimated too highly, or protected too sacredly. The reader of history knows that for many weary ages the people suffered for the want of them; it would not only be stupidity, but madness in us not to preserve them. No man has a deeper conviction of their value, or a more sincere desire to preserve and perpetuate them than I have.

Nevertheless, these exalted and sacred provisions of the Constitution must be read alone and by themselves, but must be read and taken in connexion with other provisions. The Constitution was framed by great men-- men of learning and large experience, and it is a wonderful monument of their wisdom. Well versed in the history of the world, they knew that the nation for which they were forming a government would, unless all history is false, have wars, foreign and domestic. Hence the government framed by them is clothed with the power to make and carry on war. As has been shown, when war comes, the laws of war come with it. Infractions of the laws of nations are not denominated crimes, but offenses. Hence the expression in the Constitution that "Congress shall have power to define and punish offenses against the law of nations." Many of the offenses against the law of nations for which a man may lose his life, his liberty or his property are not crimes. It is an offense against the law of nations to break a lawful blockade, and for which a forfeiture of the property is the penalty, and yet the running of a blockade has never been regarded a crime; to hold communication or intercourse with the enemy is a high offense against the laws of war, and for which those laws prescribe punishment, and yet it is not a crime; to act as a spy is an offense against the laws of war, and the punishment for which in all ages has been death, and yet it is not a crime; to violate a flag of truce is an offense against the laws of war, and yet not a crime of which a civil court can take cognizance; to unite with banditti, jayhawkers, guerrillas or any other unauthorized marauders is a high offense against the laws of war; the offense is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offense, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war. Some of the offenses against the laws of war are crimes, and some not. Because they are crimes they do not cease to be offenses against those laws; nor because they are not crimes or misdemeanors do they fail to be offenses against the laws of war. Murder is a crime, and the murderer, as such, must be proceeded against in the form and manner prescribed in the

Attachment 2 to RE

Page 9 of 12

Constitution; in committing the murder an offense may also have been committed against the laws of war; for that offense he must answer to the laws of war, and the tribunals legalized by that law.

There is, then, an apparent but no real conflict in the constitutional provisions. Offenses against the law must be dealt with and punished under the Constitution, as the laws of war, they being part of the law of nations; crimes must be dealt with and punished as the Constitution and laws made in pursuance thereof, may direct.

Congress has not undertaken to define the code of war nor to punish offenses against it. In the case of a spy, Congress has undertaken to say who shall be deemed a spy, and how he shall be punished. But every lawyer knows that a spy was a well-known offender under the laws of war, and that under and according to those laws he could have been tried and punished without an act of Congress. This is admitted by the act of Congress, when it says that he shall suffer death "according to the law and usages of war." The act is simply declaratory of the law.

That portion of the Constitution which declares that "no person shall be deprived of his life, liberty or property without due process of law," has such direct reference to, and connection with, trials for crime or criminal prosecutions, that comment upon it would seem to be unnecessary. Trials for offenses against the laws of war are not embraced or intended to be embraced in those provisions. If this is not so, then every man that kills another in battle is a murderer, for he deprived a "person of life without that due process of law" contemplated by this provision; every man that holds another as a prisoner of war is liable for false imprisonment, as he does so without that same due process. The argument that flings around offenders against the laws of war these guarantees of the Constitution would convict all the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it can not be the true construction— it can not be what was intended by the framers of the instrument. One of the prime motives for the Union and a Federal Government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a *felo de se*. If a man should sue out his writ of habeas corpus, and the return shows that he belonged to the army or navy, and was held to be tried for some offense against the rules and articles of war, the writ should be dismissed, and the party remanded to answer to the charges. So, in time of war, if a man should sue out a writ of habeas corpus, and it is made to appear that he is in the hands of the military as a prisoner of war, the writ should be dismissed and the prisoner remanded to be disposed of as the laws and usages of war require. If the prisoner be a regular unoffending soldier of the opposing party to the war, he should be treated with all the courtesy and kindness consistent with his safe custody; if he has offended against the laws of war, he should have such trial and be punished as the laws of war require. A spy, though a prisoner of war, may be tried, condemned and executed by a military tribunal without a breach of the Constitution. A bushwacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned and executed as offenders against the laws of war. The soldier that would fail to try or spy or bandit after his capture, would be as derelict in duty as if he were to fail to capture: he is as much bound to try and to execute, if guilty, as he is to arrest; the same law that makes it his duty to pursue and kill or capture, makes it his duty to try according to the usages of war. The judge of a civil court is not more strongly bound under the Constitution and the law to try a criminal than is the

Attachment 2 to RE \_\_\_\_\_

Page 10 of 12

military to try an offender against the laws of war.

The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, or bandit or other offender against the law of war, may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.

The laws of war authorized human life to be taken without legal process, or that legal process contemplated by those provisions in the Constitution that are relied upon to show that military judicial tribunals are unconstitutional. Wars should be prosecuted justly as well as bravely. One enemy in the power of another, whether he be an open or a secret one, should not be punished or executed without trial. If the question be once concerning the laws of war, he should be tried by those engaged in the war; they and they only are his peers. The military must decide whether he is or not an active participant in the hostilities. If he is an active participant in the hostilities, it is the duty of the military to take him a prisoner without warrant or other judicial process, and dispose of him as the laws of war direct.

It is curious to see one and the same mind justify the killing of thousands in battle because it is done according to the laws of war, and yet condemning that same law when, out of regard for justice and with the hope of saving life, it orders a military trial before the enemy are killed. The love of law, of justice and the wish to save life and suffering, should impel all good men in time of war to uphold and sustain the existence and action of such tribunals. The object of such tribunals is obviously intended to save life, and when their jurisdiction is confined to offenses against the laws of war, that is their effect. They prevent indiscriminate slaughter; they prevent men from being punished or killed upon mere suspicion.

The law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, etc., are offenders against the laws of nature and of war, and as such amenable to the military. Our Constitution has made those laws a part of the law of the land.

Obedience to the Constitution and the law, then, requires that the military should do their whole duty; they must not only meet and fight the enemies of the country in open battle, but they must kill or take the secret enemies of the country, and try and execute them according to the laws of war. The civil tribunals of the country can not rightfully interfere with the military in the performance of their high, arduous and perilous, but lawful duties. That Booth and his associates were secret active public enemies, no mind that contemplates the facts can doubt. The exclamation used by him when he escaped from the box on to the stage, after he had fired the fatal shot, *sic semper tyrannis*, and his dying message, "Say to my mother that I died for my country," show that he was not an assassin from private malice, but that he acted as a public foe. Such a deed is expressly laid down by Vattel, in his work on the law of nations, as an offense against the laws of war, and a great crime. "I give, then, the name of assassination to treacherous murder, whether the perpetrators of the deed be the subjects of the party whom we cause to be assassinated or of our sovereign, or that it be executed by any other emissary introducing himself as a suppliant, a refugee, or a

Attachment 2 to RE \_\_\_\_\_

Page 11 of 12

deserter, or, in fine, as a stranger." (Vattel, 339.)

Neither the civil nor the military department of the Government should regard itself as wiser and better than the Constitution and the laws that exist under or are made in pursuance thereof. Each department should, in peace and in war, confine itself to its own proper sphere of action, diligently and fearlessly perform its legitimate functions, and in the mode prescribed by the Constitution and the law. Such obedience to and observance of law will maintain peace when it exists, and will soonest relieve the country from the abnormal state of war.

My conclusion, therefore, is, that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong of the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.

I am, sir, most respectfully, your obedient servant,

**JAMES SPEED.**  
**Attorney General.**  
**To the President**

Lincoln Assassination  
Conspiracy Trial Home

Attachment 2 to RE       

Page 12 of 12